determine the matters in question, that case is distinguished from the instant case as there the engineer made the award without notice to the parties and without the knowledge or consent of the plaintiffs. And the *"Sungei Bulan"* [1983] 2 MLJ 377 granted a stay of one month "during which time the defendants were to commence arbitration proceedings in London.

The parties' expression of intention is only a *prima facie* evidence as to the proper law applicable. *Helbert Wagg Co. In Re,* [1956] 2 WLR 183, 191/[1956] 1 ALL ER 129, 136. Whether the proper law applicable is the *lex contractus* or *lex solutionis* is a matter of presumption ... and where the parties have expressed themselves (as here) the intention so expressed overrides presumption. Of course as a principle of law and practice a Court will not enforce a contract which is illegal by its own *lex fori* but on the evidence such as I have no illegality has been proved.

I now:

(a) order that the injunction granted by this Court on 28 July 1992 be set aside on the grounds that:

(i) the service of the order was effected after the award had been made;
(ii) the injunction had been obtained by non-disclosure of material facts;
(iii) the arbitration was in accordance with the COA which both plaintiffs and defendants had signed; and
(iv) plaintiffs have failed to establish fraud; and

(b) Secondly, I order that the writ of summons be set aside as:

(i) the plaintiffs and the defendants had signed the COA on 21 September 1990 and are bound by the terms which men of commerce such as the plaintiffs and defendants can understand; and
(ii) the plaintiffs' claim do not merit any adjudication by this Court as the basis of the claim fails due to there being no cause of action or substance proved.

That in short, is my conclusion based on the lengthy evidence and discussion of the legal principles and the applicable laws.

TAN SRI ABDUL AZIZ BIN ZAIN & ANOR.

v.

DEVELOPMENT & COMMERCIAL BANK BHD.

HIGH COURT, KUALA LUMPUR
PUAN RAHMAH BTE HUSSAIN JC
[CIVIL SUIT NO. S7-22-559-90]
16 OCTOBER 1992

CONTRACT: Oral agreement for sale and purchase of land - Whether there was a binding contract - Whether there was a legally enforceable agreement - Whether essential terms of agreement had been agreed upon - Whether termination of agreement by giving twenty four hours untenable and not valid.

AGENCY: Officers of bank negotiating with intended purchasers - Whether officers had actual authority to bind the bank - Whether there was ostensible or apparent authority to bind the bank.

The plaintiffs entered into negotiations with the defendant for the purchase of a piece of land for a purchase consideration of RM35 million. The plaintiffs claimed that the essential terms of the sale were agreed upon and that the manner in which the sale transaction already agreed to, will in fact go through, was to be reduced into writing and the said Purchase Agreement formalised.

The plaintiffs claimed that the defendant's purported termination of the said agreement by giving the plaintiffs 24 hours notice was untenable and not valid and that the said agreement was still binding, there being a concluded agreement.

The defendant contended that although there were negotiations for the sale of the said land by them to the second plaintiff, at no time was an agreement reached between them, their servants or agents on one hand, and the plaintiffs or either of them on the other.

The questions that arose for determination was whether the plaintiffs had adduced evidence to show that the persons allegedly acting on behalf of the defendant namely PW1 and DW1 had the authority, whether actual or ostensible, to bind the defendant and whether or not a legally enforceable agreement was concluded at the meeting between the first plaintiff and DW1 or prior thereto.

Held:

[1] The evidence showed that the defendant had never at any time represented or held out PW1 to have authority to represent them. The only part played by PW1 was to volunteer to find an interested buyer for the land in order to solve his own problems with the defendant.

[2] Even though at the material time DW1 was the Deputy Divisional Manager for Banking Operations, he was only an officer responsible for discussing with PW1 the latters indebtedness to the bank and he had no authority, actual or ostensible, to bind the defendant. Similarly DW4 being a Non-Executive Director of the defendant had no authority, actual or ostensible, to bind the defendant.

[3] The evidence of DW2 was more probable in that at the meeting between DW2 and PW2 only the price of land and the land were agreed upon. The other essential terms like questions of vacant possession and terms of the bank guarantee were not agreed but were to be worked out. In a sale of this magnitude it is never the contemplation of the parties to conclude it unless all other important terms had been agreed upon and as it was clear that all the essential terms of the agreement had not been agreed upon there was no concluded contract.

[4] From the documents, letters and conduct of the parties it was clear that it was not the intention of the parties to come to a definite and complete agreement on the subject of the sale. The letter of offer was conditional and subject to contract and the letter of acceptance was also conditional. In the circumstances it could not be said that there was a binding contract and that the steps taken thereafter were steps in formalisation of a binding agreement.

[5] In the absence of any contractual obligation to keep the negotiations open or to give notice to call off the negotiations, the defendant was entitled to withdraw from the negotiations at anytime.

[Plaintiffs claim dismissed with costs].

Cases referred to:

Chew San & Ors. v. Connaught Housing Development Sdn. Bhd. [1985] 1 CLJ 533/[1985] 1 MLJ 352 ***(refd)***

Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd. [1964] 2 QB 408 ***(refd)***

Kolli Para Sriramulu v. Aswatha Narayana [1968] AIR Supreme Court 1028 ***(cit)***

Rossiter v. Miller [1978] 3 App. Cas. 1124 ***(refd)***

Lim Keng Siong & Anor. v. Yeo Ah Tee [1983] 1 CLJ 233/[1983] 2 MLJ 39 ***(cit)***

Kollipara Sriramulu v. Aswatha Narayana [1968] AIR 1028 ***(cit)***

Diamond Peak Sdn. Bhd. & Anor. v. D.R. Tweedie [1982] 2 MLJ 97 ***(cit)***

JUDGMENT

Rahmah Bte Hussain JC:

The plaintiffs instituted this action by writ with a statement of claim. The averments in their statement of claim may be briefly stated as follows:

By an oral agreement arising from negotiations held towards the end of January 1989 between the first plaintiff and Mr. Brian Aw, on behalf of the defendant (hereinafter referred to as the "Bank") and one Datuk K.K. Sharma in respect of the sale of the land comprised in state lease 2875 Lot 413, Mukim of Tebrau, District of Johor Bahru it was finalised and agreed between the parties that the first plaintiff will purchase the said land from the defendant and the essential terms as agreed were:

(1) The purchase price of RM35 million which would be appropriated by the Bank as follows:

   (a) RM30 million to be applied towards the land;
   (b) RM5 million in full and final settlement of Sharma and his companies' outstanding liabilities to the Bank.

(2) 10% of the purchase price shall be paid on signing the Sale and Purchase Agreement and the remainder is payable subject to FIC approval, within 6 months thereafter by a Bank guarantee to be provided.

It was also agreed then that the manner in which the sale transaction already agreed to, will in fact go through was to be reduced into writing and the said Purchase Agreement formalised. Alternatively, the plaintiffs averred that a contract was concluded and contained in letters dated 6 March 1989, 14 April 1989, 17 April 1989 and 26 April 1989 written by BNP International Financial Services (Singapore) Ltd. who were the financial advisers of the plaintiffs and the Bank's solicitors.

The plaintiffs also averred that the Bank's purported termination of the said agreement by giving the plaintiffs twenty-four-hours' notice *vide*, their letter dated 10 July 1989 is untenable and not valid and that the said agreement is still binding on the plaintiffs and the Bank, there being a concluded agreement.

In its statement of defence the Bank contended that although there were negotiations for the sale of the said land by the Bank to the second plaintiff, at no time was an agreement reached between the Bank, their servants or agents on one hand, and the plaintiffs or either of them, on the other.

Now the brief facts of the case are these:

The land in question was originally owned by a company called MPC Holdings Sdn. Bhd. of which the major shareholder and managing Director was Dato' K.K. Sharma (PW1). The company was heavily indebted to the Bank and as a result the Bank took foreclosure proceedings on the land which was charged to the Bank. The Johor Bahru High Court then gave an order for sale. The company appealed against the order, but a day before the appeal, a settlement was arrived at which was recorded in Court as a Consent Order, sometime in April 1983. It was agreed that the reserve price should be fixed at RM95 million. There were several abortive auctions and ultimately in 1986 the Bank bought the land for RM25 million from the last public auction.

Sometime after this the Bank commenced proceedings against PW1 as a guarantor. The Bank then obtained judgment against PW1 on the guarantee and he subsequently appealed against the said decision. In the meantime, sometime towards the end of 1987, on his own initiative PW1 discussed his problems with the Bank. He dealt with one Mr. Brian Aw (DW1) in all his discussions and exchange of correspondence. While he was negotiating with DW1 he happened to meet one Mr. Sundra Moorthy (DW4) who was a director of the Bank and a Chairman of the Loans Recovery Committee. He put forward the same proposal which he had put to DW1, that is, that if he could get a buyer for RM35 million, that is RM7 million above the price which the Bank was willing to sell, then the Bank would treat the extra RM7 million as payment towards settling his debts. Later when they met again, DW4 told PW1 that if he really could get a buyer for RM35 million, he would strongly support settling the matter and would take up the said proposal with either the Loans Recovery Committee or the Board of Directors. It was then that PW1 approached Tan Sri Aziz Zain - (PW2). Subsequently when the Bank had indicated that they were happy to deal with PW2 a meeting was arranged for PW2 to meet with DW1. This was the meeting on 20 January 1989 during which the plaintiffs claimed an oral agreement was finalised.

The foregoing were the pertinent facts. Mr. D.P. Naban learned Counsel for the defendants (Bank) raised the following two points in the written skeletal arguments. First, the plaintiffs must have adduced evidence to show that the persons allegedly acting on behalf of the Bank namely PW1 and DW1 had the authority whether actual or ostensible to bind the Bank. Second, whether or not a legally enforceable agreement was concluded on 20 January 1989 or prior thereto. He then cited a number of authorities to support his contention that neither PW1 nor DW1 had the authority to act on behalf of the Bank.

In the case of *Chew San & Ors. v. Connaught Housing Development Sdn. Bhd.* [1985] 1 MLJ 352 at p. 353, Syed Agil Barakbah F.J. had this to say:

> The legal position of a company or a corporation is that being a fictitious person it can only do any act which includes making a representation through its agents or servants. The capacity of such a company is limited by its memorandum and articles of association. In other words, it can act within the ambit of the powers or provisions expressly provided in the memorandum and articles of association. In the ordinary course of business, a third party when entering into a contract with a company normally relies on the authority of an agent of the company.

And in the case of *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 QB408.502-504 at p. 504, Lord Diplock explained at length the difference between an actual and an apparent or ostensible authority and the principles applicable. He said as follows:

> It is necessary at the outset to distinguish between an 'actual' authority of an agent on the one hand and an 'apparent' or 'ostensible' authority on the other ... An 'actual' authority is a legal relationship between

principals and agent created by a consensual agreement to which they alone are parties ...

An 'apparent' or 'ostensible' authority on the other hand is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligation imposed upon him by such contract.

Turning now to the evidence adduced by the plaintiffs. PW1 testified that he was appointed by DW1 and DW4 to act for the Bank, that is to find a buyer for the land in question. However during his cross-examination he expressly admitted that he had never been appointed in writing by the Bank. This fact was confirmed by DW1 and DW4. Thus it is clear that PW1 had no actual authority to act for the Bank. As regards "ostensible" authority PW2 said during his cross-examination that he only knew about PW1's relationship with the Bank as a chargor and Director of the Bank. The evidence showed that the Bank had never at anytime represented or held out PW1 to have authority to represent the Bank. Furthermore the fact that PW2 requested for a meeting with a representative of the Bank goes to show that he was aware that PW1 had no authority to act for the Bank in this matter. As such I am of the view that the only part played by PW1 was to volunteer to find an interested buyer for the land in order to solve his own problems with the Bank.

Now we come to DW1, that is whether he had the authority actual or ostensible to bind the Bank. Mr. D.P. Naban submitted that DW1 had no such authority. He said DW1's authority was only to discuss proposals, terms and conditions and make recommendations to the Executive Committee or the Board of Directors of the Bank.

On the other hand, Mr. K.S. Narayanan learned Counsel for the plaintiffs submitted that DW1 had full authority in that he was put out as a representative of the Bank in dealing with the land and Dato' K.K. Sharma's problem.

After scrutinising the evidence adduced by both parties on this point I was satisfied that DW1 had no authority, actual or ostensible to bind the Bank. Even though at the material time DW1 was the Deputy Divisional Manager for Banking Operations nevertheless to my mind, he was only an officer responsible for discussing with PW1 the latter's indebtedness to the Bank. As a matter of fact PW1 accepted that DW1 had no authority. During cross-examination he said:

> My understanding was that Brian Aw did not have authority to bind the Bank. I did not have any false impressions but he did go and convey that the committee has accepted my offer and he said that now I had to give a formal offer in writing.

I was also satisfied that DW4 (Mr. Sundra Moorthy) had no authority actual or ostensible to bind the Bank, because he was a non-Executive Director. He said:

> I was not an Executive Director. I was merely a member of the Executive Committee.

The next point for consideration is whether there was a legally enforceable agreement concluded on 20 January 1989. There are two conflicting versions of what happened on that date. According to PW1 there was a basic reaffirmation of what PW2 had conveyed through him to the Bank and what the Bank had conveyed through him to PW2. The gist was:

(1) The Bank would sell and PW2 would buy the land at RM35 million.
(2) 10% would be paid on signing the Sale & Purchase Agreement.
(3) The balance 90% within 6 months after FIC approval either by cash or a bank guarantee and PW2 would nominate one of his companies for the purpose of purchasing the land.

In other words, PW1 said that the essential terms of the Sale & Purchase Agreement were concluded on 20 January 1989. PW2 confirmed this fact and said that DW1 agreed to the terms.

DW1 on the other hand testified that they discussed about the land and the price but that he told PW2 to put the proposal into writing so that he could bring it to the Problem Loans Committee or the Executive Committee for consideration. Furthermore he said that PW2 told him he needed 3 weeks to make further investigations regarding the titles and the squatters on the land, before he could make an offer to the Bank.

In his submission, the learned Counsel for the plaintiffs, said that what is important is the intention of the parties at the time of the Agreement, that is whether the intention was to buy and sell land and whether their minds met on that intention. He also said that the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous Agreement. He then cited the case of *Kolli Para Sriramulu v. Aswatha Narayana* [1968] AIR Supreme Court 1028. It was held:

> A mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract ...

The learned Counsel for the Bank contended that in a transaction as large as this, the terms alleged by the plaintiffs are too uncertain to form a binding and enforceable agreement.

It is trite law that if a contract has been concluded then all parties are bound by it. However, in the present case, I accept the evidence of DW2 as more probable in that only the price of land and the land were agreed at the meeting on 20 January 1989; the other essential terms like questions of vacant possession, terms of the Bank guarantee were not agreed but were to be worked out. To my mind, in a sale of this magnitude, it is never the contemplation of the parties to conclude it, unless all other important terms have been agreed. This is clear from the evidence of DW1 when he said:

> Tan Sri mentioned that he needed about 3 weeks to do all the necessary checking on the titles and investigate on the squatters on the land. Tan Sri said he needed three weeks before he can come up with an offer.

This piece of evidence was confirmed by PW2 who said in answer to a question during cross-examination as follows:

> Question: After all the discussion Tan Sri, you told B.A. (Brian Aw) 'give me three weeks to do a bit of investigation ...' Remember?
>
> Answer: Yes.

Thus on the grounds firstly that PW1, DW1 and DW4 had no authority to bind the company; secondly that all the essential terms of the Agreement had not been agreed upon by the parties; thirdly that since in the subsequent correspondence between the parties, no mention was made of the concluded agreement, I am of the view that on 20 January 1989 no concluded agreement was reached.

In the case of *Rossiter v. Miller* [1978] 3 App. Cas. 1124 Lord Blackburn had this to say:

> So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties in such a case, are still only in negotiation ...

Thus it is now necessary to examine whether the alternative pleading of the plaintiffs as contained in paragraph 5 of the statement of claim can be supported by facts or law. Mr. K.S. Narayanan contended that the essential terms having been concluded on 20 January 1989 the matters thereafter were steps taken and were merely the expression of a desire of the parties as to the manner in which the transaction agreed to will in fact go through

In other words he said there is a binding contract and the steps taken thereafter are steps in formalisation. He then cited the following cases namely *Lim Keng Siong & Anor. v. Yeo Ah Tee* [1983] 2 MLJ 39; *Kollipara Sriramulu v. Aswatha Narayana* [1968] AIR 1028; *Diamond Peak Sdn. Bhd. & Anor. v. D.R. Tweedie* [1982] 2 MLJ 97.

In *Lim Keng Siong's* case, it was held:

> On the evidence and the exhibits in this case it was the intention of the parties to come to a definite and complete agreement on the subject of the sales and the mere fact that a written agreement had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement ...

So, in the present case what was the intention of the parties? From the documents, letters and the conduct of the parties I am of the opinion that it was not the intention of the parties to come to a definite and complete agreement on the subject of the sale. The letter of offer is conditional and subject to contract. The letter of acceptance is also conditional (see

pp. 14 - 17 of the Agreed Bundle of Documents - B).

Mr. D.P. Naban argued that if parties used the words "subject to contract" or "subject to terms and conditions to be agreed" they were not showing an intention to be bound.

In this case even the plaintiff's own Financial Adviser, who was negotiating the terms and conditions of the intended purchase confirmed that there was no agreement reached between the parties. Furthermore the many draft Agreements were not agreed upon or signed. It is also clear from PW1's letter to the Bank dated 26 June 1989 that he never thought that the contract had been concluded even at that stage because otherwise he would be guilty of inducing the Bank to breach the alleged contract.

Finally, to the last point for consideration, that is whether the Bank's purported termination of the said Agreement *vide* their letter dated 10 July 1989, by giving the plaintiffs twenty-four hour's notice is untenable and not valid. It was submitted on behalf of the plaintiffs that the Bank and/or its officers had a collateral motive in withdrawing, that is they intended to frustrate the transaction as they had received two other offers.

However, it was argued on behalf of the Bank that there is no contractual or any other obligation to keep the negotiations open or to give notice to call off negotiations in law.

It is clear from the letter dated 10 July 1989 (Page 100 - Bundle B) that there was no response from the plaintiffs, to the revised Draft of the Sale and Purchase Agreement which was sent to the solicitors for the plaintiffs on 29 June 1989. The plaintiffs were give eleven days to respond and yet they never did. Thus in the absence of any contractual obligation to keep the negotiations open or to give notice to call off the negotiations, I am of the view that the Bank, is entitled to withdraw from the negotiations at anytime.

Therefore for all the reasons stated and on a balance of probabilities, I have no alternative but to dismiss the plaintiffs' case with costs.

TAY GUAN SOON

v.

GANESHA SDN. BHD.

HIGH COURT, MALACCA
DATUK WIRA WAN YAHYA BIN PAWAN TEH J.
[CIVIL APPEAL NO. 11-2/1987]
11 DECEMBER 1992

LANDLORD & TENANT: Claim for vacant possession - Appeal against order of Magistrate - Whether notice to quit bad in law - Whether tenancy determined according to law - Whether tenancy is one coupled with equity - Whether appellant's occupation of land protected by equity.

The plaintiff became the registered owner of a piece of land on which the defendant was a tenant. The defendant had built a house on a piece of the said land with the permission of the previous landowner. The plaintiff served a notice to quit on the defendant and upon the defendant's failure to vacate the premises, sued for vacant possession and arrears of rental. There was no evidence of any demand for arrears of rental.

The learned Magistrate ordered the defendant to deliver up vacant possession to the plaintiff and the defendant appealed on the grounds firstly that the notice to quit was bad in law and secondly that his tenancy was coupled with an equity and could not be determined in the manner adopted by the plaintiff.

Held:

[1] It is settled law that it was the duty of the landlord to make a demand for rent on the premises and if he did not do so he could not rely on the proposition that the rent was in arrears.

[2] The plan to build the house (D3) had the signature of the trustee of the previous landowner and this signature by itself raised a strong inference that the house had been built with the express approval of the previous owners and the expenditure involved in the construction gave rise to an equity making the appellant a tenant with an equitable estoppel.

[3] Had the Magistrate drawn the proper inference from D3, she would have probably found that the tenancy was one coupled with